

Advice Memorandum

DATE: January 25, 2005

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Los Angeles Hotel Employer's Council 530-6033-7000
Case 21-CA-36402 530-6033-7008
530-6033-7056
530-6067-2030
530-6067-4300

This case was submitted for advice as to whether the Employer Hotel Council unlawfully declared impasse in its contract negotiations with the Union.

We conclude that the parties were not at a bona fide impasse when the Employer declared it on June 22. At that time, proposals were still on the table that the Employer had not yet responded to, and progress was being made, as both sides were continuing to make concessions. The Union, when confronted with the Employer's assertion of impasse, denied an impasse and stated that it wanted to continue bargaining. Moreover, the parties continued to negotiate and make progress after the declaration of impasse. Although the parties disagreed on the key issue of term of the contract, this did not prevent them from bargaining on other issues or lead to a breakdown in negotiations. Under these circumstances, we conclude that when the Hotel Council declared impasse, negotiations had not reached the point where further bargaining would be futile. Accordingly, the Region should issue a Section 8(a)(1) and (5) complaint, absent settlement, alleging that the Hotel Council unlawfully unilaterally implemented portions of its final offer in the absence of a bona fide impasse.

FACTS

Overview and Charges

The Los Angeles Hotel Employers' Council and American Hotel and Lodging Association (the Hotel Council or Employer) consists of the following nine hotels in the Southern California/Los Angeles Metropolitan area: Century Plaza Hotel and Towers; Hyatt Regency Los Angeles; Hyatt West Hollywood; Millennium Biltmore Hotel; Regent Beverly Wilshire; Omni Los Angeles Hotel and Centre; Sheraton

Universal Hotel; Westin Bonaventure Hotel; and Holiday Inn City Center.¹

The Hotel Employees & Restaurant Employees Union, Local 11, AFL-CIO (the Union) and the Hotel Council have a collective-bargaining history spanning at least 20, and perhaps 50, years.² Their most recent agreement was effective for the six years from April 16, 1998 to April 15, 2004.³ The parties agreed to extend the contract on April 7 and again on April 28.

The parties began meeting to negotiate a new contract on March 19, 2004,⁴ approximately one month before the expiration of the previous contract. They met 15 times until June 22, when the Hotel Council declared impasse and thereafter began implementing parts of its final offer. These sessions generally lasted from about two-and-a-half to four hours, often including lengthy caucuses.⁵ However, the parties primarily exchanged written proposals, with relatively minimal inter-party discussion. The term of the contract was, and continues to be, a major issue in negotiations. The Union proposed throughout negotiations a two-year contract, which would expire in the same year (2006) as certain other local unions' contracts throughout

¹ Under the new contract with the Union, the Hotel Council would include the Wilshire Grand and the St. Regis Hotel but not the Omni Los Angeles Hotel and Centre or the Holiday Inn City Center.

² The Union asserts that it has a 20-year bargaining relationship with the Hotel Council, while the Hotel Council asserts that the parties have a 50-year bargaining history, dating back to when the hotels operated under different names.

³ The Hyatt Regency Los Angeles and Hyatt West Hollywood have separate contracts, in part because they have different bargaining units.

⁴ All subsequent dates are in 2004 unless otherwise noted.

⁵ According to Chief Union Negotiator Karine Mansoorian, Hotel Council Consultant Douglas Cornford requested from the beginning of negotiations that the sessions end no later than 3:30 p.m., as he lived outside the area and needed to be at the airport by early evening. Mansoorian asserts that the Union stated it would always be ready and willing to extend the sessions late into the night, if necessary. The Union, however, never objected to having short bargaining sessions.

the United States. The Hotel Council initially proposed a six-year contract term and later a five-year term, but adamantly refused throughout bargaining to agree to a two-year term. Despite this disagreement, the parties were able to make significant progress on other issues. After the Hotel Council declared impasse, the parties met again on July 20, picking up where they had left off in negotiations and reaching tentative agreement on one subject. The parties met four additional times in August and September with the assistance of a mediator, and one time in December, reaching agreement on portions of a number of non-economic proposals.

On July 1, the Union filed the instant Section 8(a)(1) and (5) charge against the Hotel Council. The charge, as later amended, alleges that the Hotel Council violated the Act by: (1) failing to furnish information requested by the Union; (2) declaring impasse and refusing to continue negotiating even though a good-faith, valid impasse had not been reached;⁶ (3) threatening to make unilateral changes to employees' terms and conditions of employment; (4) threatening to implement changes to employees' health insurance benefits if the Union would not accept the Council's proposal for a five-year contract; (5) making unilateral changes to Union representative access, health insurance benefits (including by making the changes retroactive),⁷ and the grievance procedure; and (6) unilaterally implementing changes to employees' terms and conditions of employment by decreasing work opportunities for HART.⁸

⁶ The charge alleges that no valid, good-faith impasse existed because, among other reasons, the Hotel Council committed unfair labor practices, failed to furnish information requested by the Union, and insisted that the Union agree to a permissive subject of bargaining.

⁷ The charge further alleges that the unilateral changes to employees' health insurance benefits were not reasonably comprehended within the Hotel Council's June 22 bargaining proposal because, among other reasons, the Hotel Council: (1) withdrew its proposal for co-payments; (2) had previously proposed an October 16 implementation date for the co-payment proposal; and (3) did not bargain over its elimination of the member employers' obligation to make monthly contributions to the health insurance fund for employees who do not make a co-payment.

⁸ HART is an agency contracted by the Union to dispatch its members to various hotels in the Los Angeles area. The hotels want to be able to use hotel employees to work banquets before resorting to HART. The Hotel Council's main

The Region has concluded that there is no merit to the allegations that the Union unlawfully refused to furnish information or insisted to impasse on a permissive subject of bargaining. The other portions of the charge stem from the allegation that the Hotel Council unlawfully declared impasse, and thus depend on the resolution of that issue. The case was submitted for advice only as to whether the parties were at impasse.

Details of Bargaining for a Successor Contract

First Bargaining Session: March 19. Union President Maria Elena Durazo gave opening remarks, including general statements of the Union's goals for the negotiations. Hotel Council Consultant Douglas Cornford said that the Council would respond to Durazo's opening statements and provide its proposal at the next session. Cornford then asked Union Chief Negotiator Karine Mansoorian to provide the Union's initial proposals. Although the Union had initiated bargaining, and although it had prepared bargaining proposals, it refused to provide them until the Hotel Council presented its proposals. The parties argued about this refusal for the remainder of the meeting.

Second Bargaining Session: March 26. The Union began this meeting by presenting written contract proposals, including a two-year contract term, and summarizing its position on each proposal. The Hotel Council gave a lengthy presentation on the hotel industry and tourism. It displayed data such as occupancy rates before and after September 11, 2001, and at the current time, and provided a forecast of future rates. The Council also reviewed the average room rate per night for Los Angeles County for those same time periods. Based on this data, it argued that the industry had experienced drastic negative economic changes because of the decrease in travel after September 11. Following this presentation, the Council presented and explained its initial proposals. These included a six-year contract term, as well as a proposal to completely overhaul the job classification system by deleting some classifications and combining others. The Council also proposed a new contract section ("Maximizing Work Opportunities") that would have the effect of scheduling individual employees in multiple classifications so that each could perform multiple jobs within the same shift.

concern is that the employees sent by HART are not as reliable as hotel employees.

Written Information Request. In response to the Hotel Council's March 26 presentation, the Union sent a letter to the Council on April 1 requesting certain information for each member hotel.⁹ This included, among other things: weekly average occupancy rates from January 1, 2000 to the present; weekly average daily room rates and projected occupancy rates from the week beginning Monday, April 5 until April 11, 2005; a list of hotel events that resulted in the sale of more than 50 room nights (including the dates of each event) from January 1, 2000 to the present, as well as projections of this data from April 2, 2004 through April 2, 2006. The Union did not specify a deadline for providing the information.

Third Bargaining Session: April 2. The parties discussed various pending proposals, including the term of the contract. Cornford asked why the Union wanted a two-year agreement. Mansoorian replied that it had two central reasons: (1) times were uncertain; and (2) so that the contract would expire in the same year as other contracts that HERE Locals have across the country. Cornford continued to ask the same question notwithstanding the Union's response. After discussing this issue for approximately 15 minutes, the parties moved on to discuss successorship language. The Hotel Council made a proposal on medical leave of absence, and proposed that the "Banquet Servers- Vacation Pay" section be held for the economic discussion. The Union countered the Hotel Council's March 26 no-strike clause proposal. The Union also orally requested information concerning the Hotel Council's March 26 classification proposal, including more detailed information on the proposal and which employees it would affect. Cornford responded that it would get back to the Union on this request.

Fourth Bargaining Session: April 7. The Hotel Council began the session by asking for an extension of the contract. The Union agreed to an unlimited extension, with a cancellation notice, which was signed by the parties during the meeting. The Union then submitted a proposal

⁹ This request was the basis for one of the refusal to provide information allegations in the instant case. The Region determined that there is no merit to that allegation. It concluded that the Hotel Council furnished all of this information on a composite basis and eventually some of it broken down by individual hotels. Inasmuch as the Council was bargaining as one entity representing nine hotels, the Region concluded there was no obligation to submit the information on a hotel-by-hotel basis.

with completely new contract language on mandatory meetings, including that employees be compensated for up to four hours when they are required to attend mandatory meetings. The Hotel Council made an oral counterproposal of two hours' compensation for mandatory meetings. The Union responded that in practice the hotels already paid employees for up to four hours for mandatory meetings, and thus there should be no issue with its initial proposal. Cornford reiterated that the Hotel Council was willing to agree to a two-hour proposal.

Thereafter, the Hotel Council submitted a document containing several counterproposals and/or rejections of the Union's original March 26 proposals. This included a rejection of the Union's two-year contract proposal and a reiteration of the Council's proposal for a six-year contract. With regard to "Union Leaves of Absence," the Hotel Council moved from its initial proposal of a one-year maximum leave of absence and proposed a maximum of three years, with a limit of two employees per hotel. The Union countered with a proposal that eliminated the limit on the number of employees on leave and allowed for a 10-year maximum leave of absence. The Union argued that the original contract had no limit on the time that an employee could be on Union leave, and that it was attempting to meet the Hotel Council halfway on this issue. Cornford responded that an unlimited number of employees was unacceptable. The Union responded that the hotels already retained the right to deny an employee's request for a Union leave of absence. Cornford then replied that the Hotel Council would consider the Union's proposed 10-year limit.

The parties also discussed future negotiations. The Hotel Council proposed that in order to be more productive, the parties should meet more often. The Union contended that given the large number of proposals on the table, it needed time between sessions to review the proposals, and that the parties should focus on the substance of the sessions rather than their number. During this exchange, the Hotel Council declared without explanation that the parties needed to conclude negotiations by the end of May.

Second Written Information Request. On April 12, the Union wrote a letter to the Hotel Council requesting the following information:

1. A description of the system that the various member hotels used to record employee data;¹⁰

¹⁰ The Union asserts that it needed this information to enable it to modify its "Employee Information" proposal to accommodate the hotels' needs.

2. Information pertaining to the number of employees who, within the past 6 years, have taken personal leave of absence per each hotel; and
3. That the Hotel Council notify the Union whether its proposal on "Job Classifications" would result in a deletion of current classifications occupied by employees.

The Union gave no deadline for providing this information.

The Region has concluded that the Hotel Council provided the information requested in paragraphs one and three above. The Region concluded that the Council did not have the information on personal leaves of absence in the form requested, and that the Council had notified the Union of this on May 5. Moreover, the Region noted, in effect, that the Council substantially complied with this request by offering the Union access to its human resources records so that the Union could itself ascertain the requested information.

Fifth Bargaining Session: April 13. The Union made three main counter-proposals: Leaves of Absence for Personal Reasons; Grievance Procedure and Grievance Mediation; and Orientation Meetings. The Hotel Council stated that it would make counteroffers to these proposals at the next bargaining session. Thereafter, the parties discussed the Hotel Council's "Job Classification" proposal. The Union stated that it needed to receive certain information concerning how employees would be affected before it could submit a counterproposal. Cornford replied that the Hotel Council was not going to bog down negotiations over that particular issue when it would only affect 600 employees. Cornford also allegedly stated that it was ridiculous for Mansoorian to think that he was going to discuss either her information request or the issue of job classifications during these negotiations. He further stated that the Hotel Council could not possibly discuss every proposal at the bargaining table and that the Union should wait to request that information until it actually planned to make a counter-proposal on that issue. Nothing further was discussed.

Sixth Bargaining Session: April 21. The session began with Hotel Council Attorneys Ken Ballard and Lisa Van Kriecken stating that they were replacing Cornford as bargaining representatives. International Union President John Wilhelm, who was in attendance for the first time,

stated that he was there to give an overview of some of the issues that the Union was facing on a national level. Wilhelm noted that some of the Union's bargaining proposals needed to be discussed on a national level because of the similarity of issues faced by union members across the country.

During this session, the Union introduced a new proposal regarding Section 22, Immigration, labeled "Diversity and Immigration." The Union explained that its research had concluded that African-Americans were not being hired in the industry and argued that wider diversity among applicants was needed. Attorney Ballard stated that the Council would respond to this proposal at a later date.

Ballard then stated that the Hotel Council wanted to conclude negotiations by the end of May¹¹ and therefore that it was submitting an economic proposal covering wages, sick leave, pension, and health and welfare contributions. Ballard explained each proposal, but focused on the Hotel Council's health and welfare proposal. The Hotel Council was currently required to pay \$2.70 per hour into the fund. The Union initially proposed that the Hotel Council increase its contribution by 40 cents per hour in the first year of the contract and by 50 cents in the second year. The Hotel Council proposed that there be no increases until the reserve fund decreases to six months' worth of reserves, and that thereafter the contributions be increased by 20 cents per hour in each of the first 3 years and 25 cents in the fourth year. The Union argued that the Council's proposal was nonsensical because the Council would need to pay much more than 20 cents to cover the increasing costs of the fund. The Union asked how the Hotel Council proposed to keep the program running if it would not be contributing a sufficient amount to do so. Ballard replied that he wanted to make up that amount by requiring a co-payment from employees and by diverting the Hotel Council's contributions from the legal and training funds. Ballard then proposed that employees pay a co-payment of \$5 per week for single employees, \$10 per week for one employee and one family member, and \$15 per week for an entire family. The Union then asked what would happen if after all these changes the amount of contributions were still insufficient. Ballard replied that the parties would then have to re-design the entire health and welfare plan.

In addition, the Hotel Council advised the Union that business was down, referring to its March 26 presentation on

¹¹ The Union did not respond to this comment.

business trends, and stated that as a result, it was requesting a six-year contract. The Union did not respond.

Later in the session, the Union asked about its April 1 information request, noting that it had received some of the information, but only on a composite level for all of the hotels instead of for individual hotels as requested. Ballard replied that legal authority suggested that furnishing this information as requested would constitute an anti-trust violation, and noted that the hotels could not legally share that information amongst themselves. Ballard also stated that the Hotel Council would not furnish separate information because the hotels were bargaining as the Hotel Council and not as individual hotels. The Union then asked for the specific room rates and occupancy rates for each hotel. Ballard replied that he did not have some of that information and that this too raised anti-trust concerns. The parties argued extensively over this issue.

During this session, the Hotel Council presented an amended comprehensive proposal, which included a counterproposal on mandatory meetings, orientation meetings, the "HART Memorandum of Understanding (MOU)," and warnings and suspension notices. It also included a new comprehensive proposal on leaves of absences, which covered personal leave, union leave, medical leave, industrial injury leave, pregnancy leave, family medical leave, and new child leave. Finally, the Hotel Council presented new economic proposals on health and welfare, pension, legal services, HITEF (Hotel Industry Training and Educational Fund) contributions, sick leave and wages. The Union made counterproposals on management prerogatives and immigration. The parties did not discuss these proposals.

Seventh Bargaining Session: April 28. The parties discussed the proposals on Orientation Meetings and Employee Information, as well as other outstanding proposals such as Leaves of Absence. The Union then rejected the Hotel Council's proposals on Health and Welfare, Pension, Legal Services, and HITEF contributions. The Union also made two proposals: a counterproposal to the Hotel Council's sick leave proposal, wherein the Union proposed "Paid Time-Off," an entirely new section to the contract, and a counterproposal on Short Shifts.

The parties also discussed the Union's prior information requests. The Hotel Council stated that the information concerning monthly employee data requested by the Union consisted of complicated data that would be too difficult to furnish. The Union reiterated that if the Hotel Council disclosed what computer format it used to retain this employee data, the Union could modify its

proposal regarding Employee Information to accommodate the Hotel Council. Regarding the Union's request for financial information, the Union reiterated that it had yet to receive this information and that it needed it to be broken down by hotel. Ballard again asked why the Union needed this information, and Mansoorian replied that it was necessary in order to develop its wage proposals. Mansoorian told Ballard that he should read the information request and advise her what specific parts he considered irrelevant. Ballard declared that he would do so and would expect her to explain the relevance of each, and that he would see if he could do anything about the request.

Eighth Bargaining Session: May 6. The session began with Van Krieken stating that she had faxed some of the requested information to the Union the previous night, including "Convention and Night Shift Differentials" from 1998 through 2006. Van Krieken noted that conventions in the city had declined since 2001 for several reasons, including competition from other cities.

The Hotel Council made a written counterproposal on short shifts and oral proposals on management prerogatives and the HART MOU. In addition, it offered to accept the Union's proposal on "Employee Information" if the Union accepted its proposed changes to the grievance procedure section. The Hotel Council then generally explained its goals for the changes to the job classifications.

The Union made counterproposals on personal leaves of absence, warning and suspension notices, mandatory meetings, and FMLA leave. It also made new proposals on pay for tipped workers during mandatory meetings, vacation time, holidays, and paid time-off.

The Hotel Council then made an oral counterproposal to the section on disciplinary warnings and suspensions. Additionally, it rejected the Union's new proposal on pay for tipped workers as well as the Union's March 26 proposals on kitchen work and housekeeping workload. The Hotel Council continued to reject the Union's proposed two-year contract term. There was substantial discussion on the Hotel Council's proposal concerning job classifications. The Hotel Council explained its proposal for consolidating and renaming certain classifications. The Union stated that the Hotel Council needed to be more specific about which hotels would be affected and exactly which classification changes it was seeking.

Ninth Bargaining Session: May 13. The Hotel Council provided the Union with some of the information requested regarding events where there were 50 or more rooms booked,

broken down by individual hotel. The Hotel Council explained that it was the perception of the general managers of the hotels that although there were a consistent number of groups booking events, the size of the groups themselves have decreased over the years.

During this session, the Hotel Council made movement in three areas, including a counterproposal on leave pursuant to FMLA and an oral withdrawal of its proposals concerning workweeks and shop stewards (specifically the limitation of shop stewards per hotel). The Union, in turn, made counterproposals on the grievance procedure, warnings and suspension notices, short shifts, FMLA leave, and orientation meetings. With respect to the warning and suspension notices, the Hotel Council declared that it would be unwilling to agree to anything other than the last proposal it had made on that matter. In addition, the Hotel Council proposed a new MOU regarding the procedure for consolidating job classifications, which included an interest arbitration provision.

The parties reached tentative agreement during this session on the sections dealing with management prerogatives and orientation meetings.

Tenth Bargaining Session: May 24. The Hotel Council made counterproposals on mandatory meetings, FMLA leave, grievance procedure, and diversity and immigration. It also replaced its March 26 proposal entitled "Maximizing Work Opportunities" with a new proposal entitled "Cross Classification Work." The Union accepted the Hotel Council's proposal to combine all types of leave of absence into one new section. It also submitted new proposals on bell attendants and doormen. The parties also briefly discussed the Union's proposal on diversity and immigration. According to the Union, the parties agreed that because they were so close to agreement on the FMLA language, attorneys Van Krieken and McCracken would negotiate a separate agreement on this matter. As a result, the parties did not discuss the matter again during negotiations.¹²

Additionally, the parties discussed the Union's two-year contract proposal. The Hotel Council stated that the security of a long-term agreement was valuable for everyone and that the Union needed to explain why it was beneficial for employees to have a two-year contract. The Union replied that it was simply not impressed with the Hotel Council's arguments as to why it needed a six-year contract.

¹² McCracken and Van Krieken apparently never met to discuss the FMLA language.

As a result of this discussion, the Union, during a lunch break, prepared a written explanation as to why it was seeking a two-year term and submitted it to the Hotel Council. The Union explained that it wanted a two-year contract because of the current uncertain economic times and the war in Iraq, and that because of these considerations, it would not be beneficial for the Union to tie itself down to a long-term contract. Additionally, it explained that it wanted a two-year contract in order to have it expire the same year as other contracts that HERE Locals in the industry had in certain cities across the country.¹³ Finally, the Union argued that this two-year contract term would be less disruptive to the industry as a whole.

Thereafter, the Hotel Council orally proposed a five-year contract term instead of its initial six-year proposal. It also submitted a new economic proposal covering wage rates, sick leave, and pension and health contributions. It announced that it would serve notice the following day to terminate the contract extension. Ballard stated that negotiations should not go past the end of June. He noted that with the parties meeting weekly, there should be no reason not to conclude negotiations by that time. He also said that he wanted to end by June because the negotiations were causing significant disruptions, and added that this was also why he was opposing the two-year agreement. Ballard said that the disruption from contract negotiations outweighed the Union's reasons for wanting a two-year contract. He added that he believed a five-year agreement is what a contract should look like.

Ballard then stated that the Hotel Council was making a new proposal regarding a wage increase, retroactive to April, and that this wage package was not a final proposal but was certainly close to what a settlement should look like. He then allegedly declared that the Union did not have the same desire to finish negotiations, and as a result, the Council was going to motivate the Union by canceling the extension of the contract. Mansoorian replied that the Hotel Council was the only party discussing the possibility of a strike. She stated that the Union was interested in settling the contract, and that although the Union kept offering the Hotel Council counterproposals, the Council continued to reject these offers without discussion with the Union. Ballard reiterated his belief that the Union was not interested in reaching an agreement.

¹³ According to the Union, by negotiating all of these contracts simultaneously, the stakes would be raised for all parties, which in turn would encourage a willingness to bargain.

Mansoorian replied that the Hotel Council had not agreed to a single non-economic proposal and was in no position to object that the Union had not agreed on any economic issues. Ballard stated that the Union had failed to withdraw any proposals. Mansoorian repeated that the Union continued to offer counterproposals and accused Ballard of not negotiating in good faith. Additionally, Monsoorian objected to the June deadline set by Ballard, noting that it was arbitrary. She further stated that without giving and taking by the parties, they would never be able to agree on a contract. She noted that just because Ballard announced negotiations would end by a given date, it did not mean that the parties would be able to negotiate all terms of the contract by that date, especially when he was not giving anything to the Union.

Eleventh Bargaining Session: June 1. The bargaining session began with the Union submitting a modified proposal on warning and suspension notices and a counterproposal on the grievance procedure section. There was also limited discussion on the Union's immigration and diversity proposal and the Hotel Council's economic proposals.

Ballard allegedly stated that the Hotel Council would not make any other proposals on economic terms until the Union agreed to a five-year contract term. The Union made an oral proposal on wages and banquet gratuities. The Union proposed a \$1.25 per hour pay increase for non-tipped classifications and a 70 cents per hour pay increase for tipped employees, retroactive to April 16. It also proposed an additional increase in 2005 of \$1.50 an hour for non-tipped employees and 80 cents for tipped employees. Additionally, the Union submitted a proposal for banquet gratuity rates of 18 percent. The Union maintains that although the Hotel Council asked questions about these wages, it did not make any counterproposals.

The Union reiterated its proposal to eliminate the meal credit for the HITEF diversity funding. The parties also discussed the various proposals on the warning and suspension notice section and the grievance procedure. They were able to agree on some parts of the grievance procedure language. At one point, Ballard stated that the Hotel Council would accept the Union's employee information proposal if an agreement was reached on the grievance process. Ballard also asked about the Union's position regarding the Hotel Council's job classification consolidation proposal, which allegedly contained an interest arbitration clause. The Union orally rejected this proposal, but did not offer a counterproposal.

With respect to the health and welfare benefits section, Ballard allegedly stated that the Hotel Council was aware that there were questions as to how its proposed co-payment plan would be coordinated with the present plan structure. According to the Union, Ballard stated, "we will drop our proposal for a co-pay if the union agrees to a five-year agreement." Mansoorian then asked what additional payments the Hotel Council would make to the health and welfare plan. Ballard allegedly stated that he would not discuss economics any further unless the Union agreed to a five-year contract term. Mansoorian asserts that Ballard accused her of lacking authority to settle anything but a two-year contract. Mansoorian replied that it was not the case but merely Ballard's opinion. Ballard then stated, "If you want a contract with improvement, you have to agree to a five-year agreement." Mansoorian asked why the Union should do so when it did not know what was in the contract and remarked, "You want us to agree to a five-year plan and then find out what's in it." Ballard allegedly replied, "We will not agree to a two-year agreement." Mansoorian simply stated that the Union could not agree to a five-year contract without knowing what the Hotel Council would offer on other subjects.

Mansoorian then returned to the health and welfare plan issue and asked if Ballard was proposing to eliminate the legal fund altogether. Ballard replied that he was not, but instead was proposing to divert the contributions from that fund to the health and welfare fund because it had 34 months of reserves. Mansoorian then noted that because the Hotel Council was proposing a five-year agreement, the Union wanted to know what would happen after 34 months. Ballard replied that the contributions would resume once the reserves went down to zero. Mansoorian asked if there was a possibility of a lapse in this policy, because if the parties waited until the reserves were at zero, it would take time for the fund to replenish itself. Ballard replied that that was a possibility. Mansoorian then argued that the current health and welfare system was not set up to have different levels of funding as proposed by the Hotel Council (\$5, \$10, and \$15 per week). Mansoorian noted that the fund currently only had one level of funding for all employees regardless of their family status.

Mansoorian also advised Ballard that the Hotel Council's proposal regarding the pension plan was substantially lower than what the Union was proposing. She said that it had the effect of preventing the Union from improving the plan. Mansoorian claims that Ballard only replied that he was not going to make any other proposals on economics until the Union agreed to a five-year contract. According to Mansoorian, Ballard did not detail why there

needed to be agreement on the term of the contract prior to discussing any economic proposals. Mansoorian stated that Ballard could propose a five-year agreement but that he could not refuse to talk about economic proposals. Ballard allegedly replied that the Hotel Council was not going to agree to a two-year agreement and that until the Union started talking about a five-year agreement, it would not discuss anything else. Mansoorian immediately noted that Ballard was not to give the Union an ultimatum. The Union stated several times during negotiations that generally the parties never discussed the term of the contract until they have formulated and discussed other proposals extensively. Mansoorian stated that it was unreasonable to attempt to pressure the Union into agreeing to a term of a contract when the Hotel Council had not made movement on non-economic proposals. Ballard did not respond.

Twelfth Bargaining Session: June 8. The Hotel Council submitted counterproposals on short shifts, grievance procedure, and warnings and suspension notices. The Union provided the Hotel Council with counterproposals on the grievance procedure, warning and suspension notices, health and welfare, and pension contributions.

In addition to this exchange of documents, there was some discussion about the Hotel Council's cross-classification and job classification proposals, as well as the Union's successorship proposal. Ballard allegedly stated, "the solution to talking about the Union's successorship proposal and everything else is agreeing to a five-year contract." The Union responded that there were many other issues to discuss. The Union then submitted a proposal to delete the section titled "More Favorable Contract Clause." Ballard stated that the Hotel Council would have a counterproposal on this section after a caucus. However, the Union maintains that Ballard failed to counter and to date has not submitted any type of proposal for this issue.

Thirteenth Bargaining Session: June 16. The Hotel Council made counterproposals on the grievance procedure, warning and suspension notices, and leaves of absence. After reviewing these proposals, the parties agreed that they were very close to an agreement on the leave of absence proposal, and that McCracken and Van Krieken would settle this issue off the record.

Additionally, the Union submitted seven proposals: short shifts, Union representative access, holiday pay, mandatory meetings, training for promotion, grievance procedure, and HITEF contributions. The Hotel Council then made oral counterproposals to the Union's mandatory meetings

and holiday pay proposals. It also rejected the Union's counterproposals regarding union access and the grievance procedure.

Fourteenth Bargaining Session: June 21. The Union presented and explained counterproposals on diversity and immigration, mandatory meetings, union access, a counterproposal on successorship, holiday pay, and warning and suspension notices. The Hotel Council made an oral counterproposal to its own proposal regarding Union representative access. It proposed to increase the number of representatives permitted from one to two, and then re-submitted its original proposal as modified. The Hotel Council did not make any other proposals at this time. Ballard stated that they would consider the proposals that the Union had made at the beginning of the session.

Just after a lunch break, the Hotel Council's negotiators allegedly stated that they wanted to adjourn for the day. The Union then stated that it would put the Council's entire contract proposal to its membership for a vote and asked the Council to present a final proposal the following day. The Council asked what would happen if its contract proposal were voted down. Monsoorian responded that the parties would then continue negotiating.

The Union asserts that it asked for a final contract and scheduled a vote because the Hotel Council had been telling employees that the Union had no authority on these bargaining issues and that the International was directing the Union on what to do. In this regard, it alleges that the Hotel Council was distributing and posting flyers on its website accusing the Union of not wanting employees to view the Hotel Council's contract proposals because the Union did not want employees to have a voice or vote on anything. The Union maintains that it did not intend for this vote to be binding, but rather it wanted to demonstrate to the Hotel Council that it was willing to share the Council's contract proposal with the Union membership and that it would allow employees to vote on it. The Union, however, did not tell the Hotel Council that this vote would not be binding.¹⁴

¹⁴ On September 28, Union attorney Kristin Martin represented to the Region that she was not sure whether the negotiators read or saw the flyers. She directed the Region to the Hotel Council's website. She said that the Union's request for a final proposal was a reaction to what the Hotel Council was telling the employees, and that it was not meant to be a ratification vote. According to the Union, if the employees would have voted to accept the Hotel Council's final proposal, then the Union would have returned to the bargaining table with modified proposals.

Fifteenth Bargaining Session: June 22. The Hotel Council presented a final contract proposal, in which it withdrew its proposal on seniority and amended its proposal on economic terms. The new economic proposal stated that if the Hotel Council's proposal of a five-year term were accepted, then it would withdraw its proposal on employee contributions to the health and welfare plan (of \$5.00 a week, \$10.00 a week, and \$15.00 a week). In addition, it said that if its five-year term proposal were rejected, the Council would maintain its requirement of a weekly employee contribution to the health and welfare plan, but would modify it to be a flat \$10.00 per week for all employees.¹⁵ It further stated that if the employees did not make such contribution, the hotel would not be obligated to make monthly contributions for that employee.¹⁶

After the Hotel Council presented its final contract proposal, the Union caucused for about two hours. Thereafter, the Hotel Council allegedly asked about the details of the upcoming employee vote. Mansoorian replied that the committee would vote, but that the proposal would be unlikely to pass because the Council had rejected many of the Union's proposals and had failed even to discuss many of them. Ballard then asked whether the Union's negotiating committee would recommend the Hotel Council's proposal to the members. Mansoorian replied that she had no comment. Ballard then asked what the bargaining committee would recommend. She responded that if the committee authorized her to disclose this to him, then she would do so. Ballard then stated that he thought it was bad faith for the Union not to tell the Hotel Council what the committee's recommendation would be.

Following this discussion, the Hotel Council negotiators left the room for a couple of minutes. When they returned, they asked whether there were any changes in the Union's position. Mansoorian responded that there were

¹⁵ The Union notes that the final proposal did not indicate when the co-payment requirement would become effective, i.e., whether it would be effective immediately or at some other date.

¹⁶ The Union contends that this entire clause (stating that if employees did not make their co-payment, the hotel would not be obligated to make any contributions on the employee's behalf) was new and had not been in any of its previous proposals. As a result, it was never discussed and the Union was not allowed to counter on the issue.

none. Ballard then said, "Then our offer is final and we are going to implement because we are at impasse. We don't need to know what your committee says." Mansoorian told Ballard that they were not at impasse and explained that the Union was making proposals and was still willing to discuss these proposals. Mansoorian also stated that the Union had submitted many proposals that remained unanswered by the Hotel Council. Ballard replied, "Well, we reject all of your proposals," and he and the other Hotel Council representatives then left the room.

Post Declaration of Impasse Events

On or about June 24, the Union received a fax from the Hotel Council stating that it intended to begin implementing portions of its final contract proposal. The fax detailed the scheduled implementations as follows:

- Union Access, Health and Welfare Benefits co-payments, and Grievance Procedures to be effective July 2;
- HART proposal to be effective August 1 - specifically, allow in-house employees to work banquets prior to HART employees; and
- New Paid Sick Leave program to be effective October 1.

On about June 25, the Hotel Council announced to employees a schedule for implementing its final offer, stating that on July 2, the day after the scheduled vote, they must begin paying \$10 per week for their health insurance and that Union representatives would no longer have full access to the workplace.

On about July 1, the employees voted overwhelmingly to reject the Hotel Council's final offer.¹⁷ On or about July 2, the Union faxed a letter to the Hotel Council announcing the results of the vote. The letter stated that the Union wanted to resume negotiations and requested that the Hotel Council contact it with available bargaining dates. That same day, the Hotel Council contacted the Union to schedule another bargaining session for the following week.

On about July 2, the Union received letters from the nine member hotels concerning the Hotel Council's implementation of its union access proposal. The letters requested that the Union give advance notice of which two Union representatives would be assigned to represent employees at each hotel.

¹⁷ The final count was as 1822 to 159.

On or about July 20, the parties met for another bargaining session. During this session, the parties picked up where they had left off in negotiations, and reviewed six of the Union's June 21 proposals that the Hotel Council had not yet responded to.¹⁸ In addition, they discussed the Hotel Council's previous proposal concerning mandatory meetings. The Union contends that one and a half hours into its caucus, the Hotel Council interrupted the Union and stated that it did not want to wait for the Union any longer. The Union insisted that the Hotel Council remain at the session. Subsequently, the Union submitted a counterproposal on mandatory meetings and, according to the Union, the parties reached a tentative agreement on this issue. Additionally, the Union withdrew its proposal on warning and suspension notices and proposed a subcommittee to discuss the language in the diversity and immigration section. Ballard allegedly stated that the Hotel Council would consider this and asked the Union to submit a list of the issues it wanted to discuss. Ballard declared that the Hotel Council would consider this list and thereafter decide whether to continue negotiations. He allegedly concluded the meeting by stating that if the Hotel Council wanted to meet again for negotiations, it would contact the Union.

On August 17, 19, 20 and September 2, the parties met for further negotiations with the assistance of FMCS Director Peter Hurtgen as a mediator. With Hurtgen's assistance, the parties have been able to reach tentative agreements on portions of non-economic proposals, such as the grievance procedure, diversity and immigration, employee information and leave of absence. The parties also discussed union access (e.g., union visitation and investigations), cross-classifications and HART. The parties apparently did not discuss the term of the contract or agree on any economic terms.

In response to media reports that the Union wished to resume bargaining and that Union President Durazo thought there was "much to talk about," the Hotel Council sent a letter to Durazo on October 5 requesting information from the Union in order for the Council to consider the Union's apparent request to resume negotiations. Specifically, the Hotel Council requested, among other things, a list of Union proposals for which the Union had changed its previous position; a list of proposals the Union was willing to withdraw; and the Union's position on the duration of any

¹⁸ The Council had summarily "rejected" all of the Union's proposals on June 22, but had not discussed them or explained why it was rejecting them.

new contract. On October 21, Durazo reiterated the Union's "willingness and desire" to resume negotiations. The Union described several areas where progress had been made in the last bargaining session and where the Hotel Council had indicated that it would provide counter proposals. On November 3, the Hotel Council responded by letter to the Union that negotiations would not be successful unless and until the Union is willing to modify its position regarding the term of the contract. The Union wrote to the Council on November 8, again urging that the parties resume negotiations. Durazo explained that there were many other subjects besides the term of the agreement to be discussed, and stated that while the Union was not prepared at that time to compromise its position on the term of the agreement, it had not foreclosed compromise on this issue depending on what else happens in negotiations. On November 9, the Hotel Council agreed to meet with the Union.

The parties resumed negotiations on December 13. Negotiations broke down at that session, and the parties have not met since then. The Hotel Council wrote a letter to the Union on December 27 suggesting that the parties meet on January 10 and 11, 2005. The Union responded to that letter that it was unable to meet on those dates, but proposed January 24 and 25. The Hotel Council responded that it was unavailable on those dates, but suggested dates of February 1 or 2. It is not known yet whether negotiations will occur on those dates.

ACTION

We conclude that the parties were not at impasse when the Hotel Council declared it on June 22. Therefore, the Council could not lawfully have unilaterally implemented portions of its proposal at that time.

1. RELEVANT BOARD LAW

An employer violates its duty to bargain if, when negotiations are in progress, it unilaterally implements changes in terms and conditions of employment.¹⁹ The Board considers negotiations to be in progress, and thus will find no genuine impasse to exist, until the parties are warranted in assuming that further bargaining would be futile or that there is "no realistic possibility that continuation of discussion ... would [be] fruitful."²⁰

The Board does not lightly infer the existence of an impasse, and the burden of proving it rests on the party asserting it.²¹ The existence of impasse is a factual determination that depends on a variety of factors, including the contemporaneous understanding of the parties as to the state of negotiations, the good faith of the parties, the importance of the disputed issues, the parties' bargaining history, and the length of their negotiations.²² The Board also considers the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement²³ and whether they continued to meet and

¹⁹ Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enfd. sub nom. AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

²⁰ Saint-Gobain Abrasives, Inc., 343 NLRB No. 68, slip op. at 16 (October 29, 2004) (citations omitted). See Cotter & Co., 331 NLRB 787, 787 (2000), enf. denied sub nom. TruServ v. NLRB, 254 F.3d 1105 (D.C. Cir. 2001), cert. denied sub nom. Teamsters, Local 293 v. TruServ, 534 U.S. 1130 (2002); Larsdale, Inc., 310 NLRB 1317, 1318 (1993), citing PRC Recording Co., 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987).

²¹ Naperville Ready Mix, Inc., 329 NLRB 174, 183 (1999), enfd. 242 F.3d 744 (7th Cir. 2001); Serramonte Oldsmobile, 318 NLRB 80, 97 (1995), enfd. in rel. part 86 F.3d 227 (D.C. Cir. 1996).

²² Taft Broadcasting, 163 NLRB at 478.

²³ Cotter & Co., 331 NLRB at 789; Wycoff Steel, 303 NLRB 517, 523 (1991).

negotiate.²⁴ In short, the Board requires that *both* parties believe that they are "at the end of their rope."²⁵

The Board has recognized that a bargaining stance where both sides merely maintain hard positions and each indicates to the other that it is standing pat is the rule in bargaining and not the exception.²⁶ In determining the existence of impasse, it is important whether the parties continue to meet and negotiate. Where movement between the parties indeed occurs, the Board does not confine its examination of bargaining history solely to the item claimed to be at impasse.²⁷ Rather, the very nature of collective bargaining presumes that while movement may be slow on some issues, a full discussion of other issues may result in agreement on stalled ones; "bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas."²⁸

2. CONSIDERATION OF IMPASSE FACTORS IN THE INSTANT CASE

A. Contemporaneous Understanding of the Parties as to the State of Negotiations

The evidence shows that the parties on June 22 did not both think that further negotiations would be futile. Although on June 21 the Union asked for a final Council proposal to take to a vote, this was in reaction to the Hotel Council's statements to employees accusing the Union of not wanting its members to view the Hotel Council's contract proposals because it did not want employees to have a voice, or a vote, concerning the negotiations. The Union maintains that it decided to put the Council's proposal to a vote in order to demonstrate that it was willing to share

²⁴ See, e.g., Huck Mfg. Co. v. NLRB, 693 F.2d 1176 (5th Cir. 1982).

²⁵ Saint-Gobain Abrasives, 343 NLRB No. 68, slip op. at 16; Grinnell Fire Protection Systems Co., 328 NLRB 585, 585 (1999) and cases cited there, enfd. 236 F.3d 187 (4th Cir. 2000), cert. den. 534 U.S. 818 (2001); Larsdale, 310 NLRB at 1318.

²⁶ PRC Recording Co., 280 NLRB at 635 (citations omitted).

²⁷ See Sacramento Union, 291 NLRB 552 (1988), enfd. 888 F.2d 1394 (9th Cir. 1989).

²⁸ Patrick & Co., 248 NLRB 390 (1980), enfd. 644 F.2d 889 (9th Cir. 1981); Sacramento Union, 291 NLRB at 556 (citation and footnote omitted).

the Council's proposals with the Union's membership. The Union also told the Hotel Council at that same meeting that if the contract were not ratified, the parties would continue negotiating. And, although the Union had not moved from its position on a two-year contract, it had indicated that it had not foreclosed compromise on this issue depending on what happened in negotiations on other issues. Thus, there was a realistic possibility of reaching agreement with continued bargaining. Although the Council, on May 24, had announced that negotiations "should" end by the end of June and that it wanted them to end then, that prediction and desire should not obscure the fact that the parties were not, on June 22, at impasse.

Moreover, the Union's response to the Hotel Council's declaration of impasse on June 22 also supports the conclusion that the parties were not at impasse. At the beginning of the June 22 session, the Hotel Council presented a final contract proposal, in which it withdrew an earlier proposal dealing with seniority and amended its economic proposal regarding employee participation in the health and welfare plan. When the Hotel Council declared that the parties were at impasse, the Union immediately denied that the parties were at impasse and explained that the Union was making proposals and was still willing to discuss these proposals. The Union also stated that it had submitted many proposals that remained unanswered by the Hotel Council.

Just prior to the Hotel Council's declaration of impasse, the Union had stated, in response to a question by the Hotel Council, that there were no changes to its position. This cannot reasonably be viewed as evidence that the parties were at impasse, however, as the Union made this statement in the context of having just the day before presented six proposals, five of which the Hotel Council had not yet responded to.²⁹ Moreover, the Union had just received a comprehensive proposal from the Council that the Union had not yet had time to review. It is clear that the Union did not know that the Hotel Council was about to declare an impasse and did not intend to give the impression that it would not make any more movement in negotiations.³⁰

²⁹ The Council had responded to one of them -- the provision on Union Representative Access -- with a counterproposal that moved towards the Union's position.

³⁰ See generally Huck Mfg. Co. v. NLRB, 693 F.2d at 1187 (union's request for a "final offer" and the subsequent strike reasonably viewed as designed to soften the company's rigid position in ongoing negotiations and was not an indication of deadlock). See also Cotter & Co., 331 NLRB at

B. Importance of the Disputed Issue

It is well recognized that there is a difference between an "impasse on a single issue that would not ordinarily suspend the duty to bargain on other issues and the situation in which impasse on a single or critical issue creates a complete breakdown in the entire negotiations."³¹ Only where the Board finds an impasse in the overall negotiations is the employer free to implement its last, best and final offer.³² The Board has held that an employer claiming that an impasse on a single, critical issue justified its implementing its bargaining proposals must demonstrate three things:

First, the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations -- in short, that there can be no progress on *any* aspect of the negotiations until the impasse relating to the critical issue is resolved. [Emphasis added.]³³

In the instant case, the term of the contract was clearly a very critical issue in negotiations. The Hotel Council made it clear that it would never agree to a two-year contract. Although the Union did not move from its position of a two-year contract, it stated that it would never agree to a five-year term *without knowing what the other terms would be*.³⁴ Thus, the Union had not foreclosed

787-788 (in response to employer's surprise announcement that its offer was final and would be implemented, union stated that employer was not offering anything the union could recommend; union's response was not reasonably interpreted as an indication of the union's willingness to negotiate further or make concessions).

³¹ Sacramento Union, 291 NLRB at 554 (citations omitted).

³² Id.

³³ Calmat Co., 331 NLRB 1084, 1097 (2000).

³⁴ See facts on the June 1 session, above. The Union reiterated this position in its November 8 letter to the Hotel Council, stating that while the Union was not prepared at that time to compromise its position on the term of the agreement, it has not foreclosed compromise on this issue depending on what else happens in negotiations.

the possibility of compromise on this issue depending on what else happened in negotiations. However, even assuming that the parties were deadlocked on this issue, it did not in fact prevent them from bargaining on other issues or lead to a breakdown in negotiations.³⁵ The parties were able to make some progress on other issues despite their differences as to term of the contract.

C. Continuation of Bargaining

Another indication that the parties did not think further negotiations would be futile and, thus, that they were not at impasse is that they continued to bargain.³⁶ On July 2, the day after the employees voted to reject the Hotel Council's final offer, the Union faxed a letter to the Council announcing the results of the vote and requesting to resume negotiations. That same day, the Hotel Council contacted the Union to schedule another bargaining session for the following week. This conduct suggests that both parties believed that further negotiations might produce agreement.

On July 20, when the parties met for another bargaining session, the parties picked up where they had left off in negotiations and discussed, among other things, the Union's June 21 proposals that the Hotel Council had not yet responded to. The Union submitted a counterproposal on mandatory meetings that day, and the parties reached a tentative agreement on that issue. The parties also met four more times in August and September with the assistance of Mediator Hurtgen. During those meetings the parties were able to reach tentative agreements on portions on non-economic proposals, such as the grievance procedure,

³⁵ See, e.g., Sacramento Union, 291 NLRB at 556 (even assuming arguendo that the parties were deadlocked on Guild security, no breakdown in overall negotiations had occurred). Compare Calmat Co., 331 NLRB at 1099 (impasse regarding key issue of pension led to a complete breakdown in negotiations).

³⁶ See Cotter & Co., 331 NLRB at 788 (two days after employer declared and union denied impasse, union's negotiators asked to meet and continue bargaining, indicating that the union "realistically believed that further negotiations might produce an agreement.") See, e.g., Colfor, Inc., 282 NLRB 1173 (1987) (agreement to meet further indicative that no impasse had been reached), *enfd.* 838 F.2d 164, 167 (6th Cir. 1988).

diversity and immigration, employee information and leave of absence.

D. Good faith of the Parties in Negotiations

The Board analyzes a number of factors, using a totality of circumstances approach, to determine whether good-faith bargaining has occurred.³⁷ In this case, each party alleges that the other engaged in bad-faith bargaining. The Region has concluded, and we agree, that there is insufficient evidence to conclude that either the Hotel Council or the Union engaged in bad-faith bargaining.

The Hotel Council alleges that the Union engaged in bad-faith conduct designed to stall bargaining until other contracts in San Francisco and Washington, D.C. expired, i.e., September 15.³⁸ Specifically, it alleges that the Union acted in bad faith by: despite having initiated bargaining, refusing to present its contract proposal at the first bargaining session because the Hotel Council was not prepared to provide its proposal; refusing the Hotel Council's requests to meet more often because it was difficult to get the large bargaining committee together;³⁹

³⁷ See, e.g., Eltec Corp., 286 NLRB 890, 896 (1987), enfd. 870 F.2d 1112 (6th Cir. 1989).

³⁸ The Hotel Council raises these bad-faith stalling tactics in defense of the instant charge. It did not specifically allege this bad-faith bargaining conduct as violative of the Act in the Section 8(b)(1)(B) and (3) charge (Case 21-CB-13770) that it filed alleging that the Union bargained in bad-faith by conditioning agreement upon resolution of issues in other bargaining units, i.e., by insisting upon a two-year contract term in order to coordinate its negotiations with those of its sister locals in other cities as part of an unlawful attempt to merge the current local bargaining unit into a broader national unit without the consent of the Council. The Region submitted that case for advice. Advice concluded in that case that the Union was privileged to demand that its contract expire during the same year as other contracts, and that there was insufficient evidence that the Union was essentially insisting upon merging the bargaining unit into a broader national unit. See UNITE HERE, Local 11 (Sheraton Universal Hotel, et. al.), Case 21-CB-13770, et al., Advice Memorandum dated this date.

³⁹ An exact number of members in the bargaining committee is unknown, but 30 to as many as 80 employees attended the bargaining sessions.

causing bargaining sessions to begin late; delaying presenting economic proposals and bargaining in a piecemeal fashion; and preventing the reaching of tentative agreements on certain provisions by adding new language to its counter-proposals after the Hotel Council had made concessions.

The Region has concluded, and we agree, that there is insufficient evidence that the Union acted in bad faith. While the Union admittedly refused to provide its contract proposal to the Hotel Council at the March 19 bargaining session, this was apparently in reaction to its mistrust of the Hotel Council and was only because the Hotel Council did not have its opening proposal ready. Thus the Union argues that it was the Hotel Council who caused the delay. In any event, both parties presented proposals at the second bargaining session.

Regarding the Hotel Council's assertions that the Union delayed presenting economic proposals and presented proposals piecemeal, the Region concluded that while the Union's initial contract proposals did not include a wage proposal, they did include various economic proposals.⁴⁰ Despite not having a complete economic proposal from the Union, the Hotel Council was able to make its own economic proposals. Moreover, the evidence shows that both parties presented proposals piecemeal.

Nor is there evidence that the Union attempted to avoid or delay agreement by adding language to proposals following movement toward agreement by the Hotel Council. In many instances where the Union added language, the Union's proposals included movement toward the Hotel Council's position in addition to the added language, and thus could reasonably be viewed as alternative proposals in an effort to reach agreement.⁴¹ Thus the additions appear to have been made in an attempt to reach, rather than forestall, an agreement. In another instance, during bargaining over "Mandatory Meetings," where both parties' proposals had included language stating that the Hotel Council would give

⁴⁰ On March 26, the Union made contract proposals for banquet servers' vacation and holiday pay. In subsequent sessions, the Union provided proposals for paid time off, pension, health and welfare, meal credits, banquet gratuities, night shift differentials, telephone operator rates, and banquet server rates.

⁴¹ For example, in its June 1 counter-proposal on grievances, the Union added new language in two areas, but at the same time it agreed to some aspects of the Employer's proposal and made movement toward the Employer in another area.

"reasonable notice" of meetings and cancellations, the Union added language addressing what would happen if reasonable notice is not given, i.e., a penalty for failure to give reasonable notice as well as progressive penalties if the Hotel Council failed to properly notify employees on a second or third occasion. We do not view this proposal as regressive, as suggested by the Hotel Council, but rather as language addressing something that had not yet been addressed. Moreover, the Union subsequently accepted the Hotel Council's definition of adequate meeting and cancellation notice.

The parties met 15 times in approximately 3 months up until the Hotel Council's declaration of impasse, and to date have met 22 times in 7 months. Although the Union turned down the Council's requests to meet more often, it proffered valid reasons for not being able to do so.⁴² Thus the Union did not refuse to meet more often in order to prevent the parties from reaching agreement. Indeed, the Union offered to meet longer at each session, but the Hotel Council cut short the bargaining sessions.⁴³ It is unclear exactly why many of the bargaining sessions began later than scheduled. The Union alleges that the Hotel Council caused at least five of the meetings to begin late. On one occasion, the Union had to wait for translation equipment to arrive that it needed to communicate with its Spanish-speaking negotiating committee members. Apparently on other occasions the Union was waiting for bargaining committee members to arrive. In any event, the evidence is insufficient to show that the Union even caused the delay a majority of the time or that any such delay was intentional.

Thus, the evidence shows that, under the totality of the circumstances, the parties did not engage in bad-faith bargaining. Rather, they met regularly, exchanged and discussed contract proposals, and made counterproposals in an effort to reach agreement.

⁴² The Union claimed that it was difficult for it to have its bargaining committee available as often as the Hotel Council wanted, and also that it needed the time between the sessions to review the Hotel Council's proposals and prepare counter-proposals.

⁴³ In the first bargaining session, Cornford requested that the sessions end no later than 3:30 p.m., as he lived outside the area and needed to catch a return flight home. The Union contends that the Hotel Council continued to cut the bargaining sessions short even after Cornford was replaced.

E. Bargaining History and Length of Negotiations

Bargaining history, although listed in Taft Broadcasting as one of the factors to consider in making an impasse determination, has been treated as the least determinative of the Taft factors. In Taft Broadcasting itself, the Board gave no indication of how the factor was to be applied or what significance it should be given.⁴⁴ In the instant case, the parties have a well-established bargaining history.

As to the length of negotiations, the Board indicates that the more meetings there have been the more likely that an impasse can be found.⁴⁵ Here, the parties held 15 meetings over a 3-month period. The fact that 15 meetings occurred before impasse was declared does not itself suggest that the parties were likely to have been at impasse.⁴⁶ This is especially true in light of the large number of subjects being negotiated and the number of employers involved.

3. SUMMARY AND CONCLUSION

In sum, at the time the Hotel Council declared impasse, proposals were still on the table from the day before and some degree of progress was being made, as both sides were continuing to make concessions. The Union, when confronted with the Hotel Council's assertion of impasse, denied an impasse and stated that it wanted to continue bargaining. Moreover, the parties continued to negotiate and make progress after the declaration of impasse, picking up where they had left off. Although the parties disagreed on the key issue of term of the contract, this did not prevent them from bargaining on other issues or lead to a breakdown in negotiations. Under these circumstances, we conclude that when the Hotel Council declared impasse, negotiations had not reached the point where there was "no realistic

⁴⁴ 163 NLRB at 478. See also Taylor-Winfield Co., 225 NLRB 457, 461 (1976) (even though no previous bargaining history between the employer and the newly certified union, Board concluded that impasse existed based on an evaluation of other Taft factors).

⁴⁵ The Baytown Sun, 255 NLRB 154, 157 (1981) (citation omitted).

⁴⁶ See Sacramento Union, 291 NLRB at 552 (parties met 17 times over 4 months).

possibility" that continuation of bargaining would be fruitful.⁴⁷

Thus, we conclude that the parties were not at impasse when the Hotel Council declared it on June 22, and the Council was not privileged to unilaterally implement portions of its proposal. Accordingly, a Section 8(a)(1) and (5) complaint should issue, absent settlement.

B.J.K.

⁴⁷ AFTRA v. NLRB, 395 F.2d 622, 628 (D.C. Cir. 1968), affg. sub nom Taft Broadcasting Co., above.